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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN LEE KLADDEN, Defendant and Appellant.	G056006 (Super. Ct. No. 17WF2288) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John S. Adams, Judge. Affirmed.

Rachel Varnell, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Randall Einhorn and Minh U. Le, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Jonathan Lee Kladden was convicted of possession of a controlled substance for sale (Health & Saf. Code, § 11378; count 1) and transportation of a controlled substance for sale (Health & Saf. Code, § 11379, subd. (a); count 2). Defendant's vehicle was searched following a traffic stop, and the police found 6.7 grams of methamphetamine in two baggies, $460 in cash, a pay-owe ledger, and a cell phone. He admitted having a prior conviction that qualified as a strike (Pen. Code, §§ 667, subds. (d), (e)(1), 1170.12, subds. (b), (c)(1))[1] and serving three prior prison terms within the meaning of section 667.5, subdivision (b). The court exercised its discretion under section 1385 and struck the prior strike and prison term enhancements for sentencing purposes. Imposition of sentence was suspended and defendant was placed on formal probation for three years with conditions, among others, that he serve 300 days in county jail and submit to search and seizure. The court also imposed an electronic search condition, stating: "You will also be required to submit any electronic devices, computers, cell phones and whatnot to search and seizure and provide any passwords that you may have. In other words, your probation officer will have access to your phones, your computers, and any sort of electronic communication. I want you to keep that carefully in mind."[2] Defendant did not object.

On appeal, defendant now raises a facial challenge to the electronic search condition, contending it is unconstitutionally overbroad. We disagree and affirm.[3]

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[1] All statutory references are to the Penal Code unless otherwise stated.

[2] This condition of probation is not included in the minute order of the sentencing hearing.

[3] Numerous cases addressing the reasonableness and/or constitutionality of an electronic search probation condition are currently pending before the California Supreme Court; in some cases, the probation condition has been upheld, while others have invalidated the condition. (See *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted Feb. 17, 2016, S230923; *In re Patrick F.* (2015) 242 Cal.App.4th 104, review granted Feb. 17, 2016, S231428; *In re Alejandro R.* (2015) 243 Cal.App.4th 556,

Because defendant did not object to the electronic search condition in the trial court, he has forfeited his ability to challenge not only the probation condition's reasonableness but he has also forfeited any claim concerning its constitutionality as applied to him. (*In re Sheena K.* (2007) 40 Cal.4th 875, 889.) In *Sheena K.*, the Supreme Court explained a probationer may raise for the first time on appeal a challenge to the constitutionality of a probation condition only if the claim presents a "'"pure question[] of law that can be resolved without reference to the particular sentencing record developed in the trial court."'" (*Ibid.*) This is because "an appellate claim—amounting to a 'facial challenge'—that phrasing or language of a probation condition is unconstitutionally vague and overbroad . . . does not require scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized legal concepts—a task that is well suited to the role of an appellate court." (*Id.* at p. 885.) In contrast, a trial court is generally "in a considerably better position than the Court of Appeal to review and modify a . . . probation condition that is premised upon the facts and circumstances of the individual case." (*Ibid.*) Thus, a claim that a probation condition is *facially* overbroad presents a pure question of law and is preserved without an objection. (*Id.* at p. 888.) But an overbreadth claim based on the facts and circumstances of the individual case is generally forfeited absent an objection. (*Id.* at pp. 885, 887-889.) Accordingly, we address defendant's claim the electronic search condition is facially overbroad.

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review granted Mar. 9, 2016, S232240; *In re Mark C.* (2016) 244 Cal.App.4th 520, review granted Apr. 13, 2016, S232849; *In re A.S.* (2016) 245 Cal.App.4th 758, review granted May 25, 2016, S233932; *In re J.E.* (2016) 1 Cal.App.5th 795, review granted Oct. 12, 2016, S236628; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, review granted Dec. 14, 2016, S238210; *In re Q.R.* (2017) 7 Cal.App.5th 1231, review granted Apr. 12, 2017, S240222; *People v. Bryant* (2017) 10 Cal.App.5th 396, review granted June 28, 2017, S241937; *People v. Trujillo* (2017) 15 Cal.App.5th 574, review granted Nov. 29, 2017, S244650; *People v. Maldonado* (2018) 22 Cal.App.5th 138, review granted June 20, 2018, S248800; *In re Juan R.* (2018) 22 Cal.App.5th 1083, review granted July 25, 2018, S249256.)

Defendant's task is not easy as "a facial overbreadth challenge is difficult to sustain." (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 577.) A facial challenge on the grounds of overbreadth and vagueness "is an assertion that the [probation condition] is invalid in all respects and cannot have *any* valid application [citation], or a claim that the [probation condition] sweeps in a substantial amount of constitutionally protected conduct." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1109.) Defendant has failed to convince us the electronic search probation condition imposed by the trial court is per se unconstitutional.

We begin by noting that probation is not a right, but an act of clemency. (*People v. Moran* (2016) 1 Cal.5th 398, 402.) "The sentencing court has broad discretion to determine whether an eligible defendant is suitable for probation and, if so, under what conditions." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) A sentencing court is authorized to impose reasonable probationary conditions to further the rehabilitative and protective purposes of probation. (§ 1203.1, subd. (j); *Carbajal*, at pp. 1120-1121.) But "[a] probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K. supra*, 40 Cal.4th at p. 890.) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.) We review a constitutional challenge to a probation condition de novo. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.)

Defendant contends the electronic search condition imposed by the trial court infringes on his constitutional right to privacy and is overbroad because it is not narrowly tailored to any state interest. We are not the first court to consider whether an electronic search condition imposed on a probationer is facially overbroad. In *People v.*

Guzman (2018) 23 Cal.App.5th 53 (*Guzman*), the defendant, a probationer, also challenged an electronic search condition as unconstitutionally overbroad, asserting it violated his right to privacy and to be free from unreasonable searches. (*Id.* at p. 63.) In *Guzman*, the trial court had modified the defendant's search and seizure probation condition to include his personal electronic devices, telling the defendant he "'must submit to search of all computers, hard drives, flash drives, thumb drives, disks, removable media, computer networks, electronic data storage devices, personal digital assistants, cell phones of any kind, notebooks or computers of any kind under the custody or control of the defendant to which he has either sole, shared, partial or limited access, without a search warrant at any time of the day or night.'" (*Id.* at p. 58.) The defendant was also required to provide his probation officer with his passwords or any other information necessary to access his data storage devices or social media accessed through his personal device. (*Ibid.*) There, like here, the defendant failed to object to the electronic search condition in the trial court, but contended on appeal that the condition was facially overbroad. (*Id.* at p. 63 & fn. 3.)

The defendant in *Guzam*, like the defendant here, relied on *Riley v. California* (2014) 573 U.S. 373 (*Riley*) to support his appellate claim. (*Guzman, supra*, 23 Cal.App.5th at p. 64.) In *Riley*, the United States Supreme Court held the Fourth Amendment requires police obtain a warrant before searching digital data on a cell phone seized incident to arrest. (*Riley*, at pp. 386, 401.) The court rejected the argument that the search of a cell phone in a search incident to arrest was indistinguishable from the search of physical items like a "cigarette pack, a wallet, or a purse" finding that "[c]ell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." (*Id.* at p. 393.) As to the quantitative difference, the court explained the immense storage capacity of a cell phone permits a user to store and carry with him or her vast types of personal information, including photographs, text and picture messages, a calendar, Internet browsing history, and more, which was not

physically practical prior to the digital age. (*Id.* at pp. 393-395.) Discussing the qualitative difference, the court noted cell phone data showing an Internet search and browsing history can "reveal an individual's private interests or concerns" and location information can show where a person has been. (*Id.* at pp. 395-396.) The court made clear it was not holding "that the information on a cell phone is immune from search" (*id.* at p. 401) as a cell phone could be searched with a warrant or under other case-specific exceptions to the warrant requirement (*id.* at pp. 401-402).

In *Guzman*, the Court of Appeal concluded *Riley* did not support the defendant's facial challenge to the electronic search condition because the defendant stood in a markedly different position than the defendant in *Riley*, and therefore, the burden on his privacy interest was different and permissible. (*Guzman*, *supra*, 23 Cal.App.5th at p. 64.) When Riley's cell phone was searched, he had not been convicted of a crime and was still protected by the presumption of innocence. (*Riley*, *supra*, 573 U.S. at pp. 378-379.) The Court of Appeal contrasted that privacy interest with Guzman's, where Guzman had pleaded guilty to an offense, was on probation (*Guzman*, at p. 64), and was therefore subject to reasonable probation conditions that deprived him "'of some freedoms enjoyed by law-abiding citizens'" (*id.* at pp. 64-65). The court recognized "Guzman's probation status does not completely vitiate his constitutional privacy rights," but nevertheless concluded "the fact that a search of an electronic device may uncover comparatively more private information than the search of a person, or a personal item like a wallet, does not establish that a warrantless electronic search condition of probation is per se unconstitutional." (*Id.* at p. 65.) We agree with *Guzman*'s reasoning and conclusion.

The balancing of a probationer's privacy interest and the state's interests in probation is substantially different than that considered in *Riley*. Defendant is not an arrestee entitled to the presumption of innocence and an unburdened right to privacy. He is, instead, a probationer subject to reasonable probation terms that can diminish his

privacy interests. (*In re Kacy S.* (1998) 68 Cal.App.4th 704, 711 ["a probationer's expectations of privacy are diminished by his probation status and are subordinated to governmental activities which reasonably limit the right of privacy"].)

A probationer with a search condition has a reduced expectation of privacy. By accepting probation with a search and seizure condition, a defendant is voluntarily waiving his right to privacy under the Fourth Amendment and consenting in advance "to warrantless searches and seizures in exchange for the opportunity to avoid serving a state prison term." (*People v. Robles* (2000) 23 Cal.4th 789, 795.) "A probationer's consent is considered 'a complete waiver of that probationer's Fourth Amendment rights, save only his right to object to harassment or searches conducted in an unreasonable manner.'" (*People v. Medina* (2007) 158 Cal.App.4th 1571 at p. 1576.) "If a defendant believes the conditions of probation are more onerous than the potential sentence, he or she may refuse probation and choose to serve the sentence." (*People v. Olguin* (2008) 45 Cal.4th 375, 379.) The burden on a probationer's right to privacy with an electronic search condition is similar to that of a standard probation search condition involving the probationer's person, residence, and vehicle, which are routinely imposed. "The level of intrusion is de minimis and the expectation of privacy greatly reduced when the subject of the search is on notice that his activities are being routinely and closely monitored." (*People v. Reyes* (1998) 19 Cal.4th 743, 753.)

Although probationary search conditions diminish a probationer's expectation of privacy, they are routinely imposed because they serve state interests as "they aid in deterring further offenses by the probationer and in monitoring compliance with the terms of probation." (*People v. Robles, supra*, 23 Cal.4th at p. 795.) "By allowing close supervision of probationers, probation search conditions serve to promote rehabilitation and reduce recidivism while helping to protect the community from potential harm by probationers." (*Ibid*.) The same interests of promoting rehabilitation, reducing recidivism, and protecting the community are promoted by permitting the close

supervision of probationers with an electronic search condition. A legitimate purpose of a search condition, either of a home or an electronic device, is preventing future criminality by promoting effective supervision. As a probationer's home is properly and reasonably the subject of a search condition, it follows that the probationer's electronic devices which are "'the digital equivalent of [the probationer]'s home'" can also be properly and reasonably the subject of a search condition. (*U.S. v. Mitchell* (11th Cir. 2009) 565 F.3d 1347, 1352 [describing the hard drive of a computer as "'the digital equivalent of its owner's home, capable of holding a universe of private information'"].) Given the prevalence of electronic devices in today's society, a probationer is more likely to have digital photographs or communication relating to illegal activities stored on an electronic device than have print photographs or written correspondence at home. Thus, balancing a probationer's privacy interest and the state's interests in probation does not lead to the conclusion that the electronic search condition imposed here was unconstitutional per se.

Defendant, like the defendant in *Guzman*, also relies on *People v. Appleton* (2016) 245 Cal.App.4th 717 (*Appleton*) to support his facial challenge. (*Guzman, supra*, 23 Cal.App.5th at p. 65, fn. 4.) *Guzman* found *Appleton* inapplicable because it did not involve a facial challenge to an electronic search condition. (*Ibid.*) Again, we agree with *Guzman*.

In *Appleton, supra*, 245 Cal.App.4th 717, when the trial court imposed the electronic search condition, the defendant objected on vagueness, overbreadth, unreasonableness, and constitutional grounds, and then on appeal, he reasserted his overbreadth and unreasonableness complaints. (*Id.* at pp. 721-722.) The *Appleton* court held the probation condition that permitted the search of the defendant's computers and electronic devices was "unconstitutionally overbroad as worded" (*id*. at p. 719), because it allowed "for searches of vast amounts of personal information unrelated to defendant's criminal conduct or his potential for future criminality" and the state's interest in

monitoring whether the defendant uses social media to contact minors could be served through narrower means (*id.* at p. 727). The *Appleton* court remanded the matter to the trial court to fashion a more narrowly tailored probation condition. (*Id.* at p. 719.) Here, however, defendant failed to object when the trial court imposed the electronic search condition and has therefore forfeited any claim that his electronic search condition is unconstitutionally overbroad as applied to him.

Defendant nonetheless contends the electronic search condition imposed by the trial court here must be stricken because it "suffers from the same deficiencies as the condition at issue in *Appleton*." The *Appleton* court indicated the computer search condition at issue before it "arguably sweeps more broadly than the standard" probation condition permitting the search of a probationer's person, home, and vehicle because "a search of defendant's mobile electronic devices could potentially expose a large volume of documents or data, . . . for example, medical records, financial records, personal diaries, and intimate correspondence with family and friends," "which may have nothing to do with illegal activity." (*Appleton, supra,* 245 Cal.App.4th at p. 725.) We see no need to treat the search of electronic devices differently than the standard search and seizure conditions routinely imposed on probationers. The standard probation search condition permits a probation officer to search a probationer's home, which contains vast amounts of personal information, i.e., medical records, financial documents, personal diaries, and even love letters. (See *In re J.E., supra*, 1 Cal.App.5th at p. 804, fn. 6, review granted Oct. 12, 2016, S236628 ["courts have historically allowed parole and probation officers significant access to other types of searches, including home searches, where a large amount of personal information . . . could presumably be found and read"]; *People v. Trujillo, supra*, 15 Cal.App.5th at p. 589, review granted Nov. 29, 2017, S244650 [noting there was no showing a search of the defendant's "electronics would be any more invasive than an unannounced, without-cause, warrantless search of his residence"].)

Similarly, defendant's reliance on *In re J.B.* (2015) 242 Cal.App.4th 749, *In re Malik J.* (2015) 240 Cal.App.4th 896, and *In re P.O.* (2016) 246 Cal.App.4th 288 is misplaced. In each case, the court did not treat the minor's appellate claim as a facial constitutional challenge. In *In re J.B., supra*, 242 Cal.App.4th 749, the Court of Appeal struck the probation condition as overbroad (*id*. at pp. 756-757), because there was "no showing of any connection between the minor's use of electronic devices and his past or potential future criminal activity" (*id*. at p. 756). *In re Malik J., supra*, 240 Cal.App.4th 896, the appellate court modified the electronic search condition to omit the requirement the juvenile turn over his passwords to social media sites to his probation officer and restricted the probation searches to the electronic devices found in the minor's custody and control. (*Id.* at p. 902.) In *In re P.O., supra*, 246 Cal.App.4th 288, the Court of Appeal noted the minor's overbreadth claim did not present a pure question of law (*id*. at p. 297), and then concluded the electronic search condition was overbroad because it was "not narrowly tailored to its purpose of furthering his rehabilitation" (*id.* at p. 298). None of the cases upon which defendant relies held that an electronic search condition, like the one imposed in this case, is overbroad per se.

Although extraneous to our analysis of whether the electronic search condition imposed here is facially overbroad, we note defendant was in possession of a cell phone when he was arrested for transporting and possessing methamphetamine for sale, and witnesses for both the prosecution and defense testified cell phones are used by drug dealers in making drug sales and retaining pay-owe documentation. Defendant was facing a potential prison sentence of 11 years when the trial court exercised its discretion to grant him probation, giving him a chance to complete a drug treatment program and avoid incarceration. The purpose of the electronic search condition imposed by the trial court is to permit defendant's probation officer to closely supervise him to determine if he is using or selling drugs. (See *People v. Ebertowski* (2014) 228 Cal.App.4th 1170, 1175 [upholding probation condition the defendant provide passwords to any electronic

devices and to social media sites and submit his devices to search, where the defendant used electronic device and social media to promote gang activity].)

We conclude the electronic search probation condition imposed in this case is not facially overbroad.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

GOETHALS, J.